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Extensions of Time and the Conveyancing Clerk

The Queensland Court of Appeal (Williams, Keane JJA and Philippides J) has recently considered the ostensible authority of a conveyancing clerk to grant an extension of the settlement date. The decision is *Inness v Waterson A/T for Cobok Family Trust* [2006] QCA 155.

Facts

The respondent was a clerk working in the office of Bell Dixon Butler and retained those lawyers to act on her behalf, as buyer, in a conveyancing transaction. The contract in question provided for settlement on Monday 10 February 2003 but was subsequently extended to Friday 14 February 2003 to coincide with the settlement of a sale of another property owned by the buyer. Due to problems associated with the settlement of this other property, the buyer spoke on the telephone with a conveyancing clerk in the office of the seller's solicitors and requested an extension of the settlement date to Monday 17 February 2003.

According to the buyer, the response of the conveyancing clerk was: "No problem, just rearrange the settlement with the bank." However, according to the conveyancing clerk her response to the requested extension was: "Okay, fine, put in writing and I'll seek my client's instructions."

Although the accounts of this crucial telephone conversation differed, it was common ground that the conveyancing clerk did not have instructions from her client to grant this extension.

Unfortunately for the conveyancing clerk, as it transpired her client did not wish to grant the extension. As a result, on Monday, 17 February 2003, the seller's solicitors sent a fax to the buyer's solicitors advising that their client did not agree to an extension of the settlement date and further advising that the contract was at an end. The buyer subsequently commenced proceedings against the seller for specific performance of the contract.

Trial Judge

The trial judge accepted the evidence of the buyer that the conveyancing clerk had agreed to the requested extension. The trial judge also concluded that the grant of the extension of time for settlement was within the apparent authority of the conveyancing clerk. As the seller did not establish that the buyer must have known that the conveyancing clerk was speaking without instructions, the trial judge concluded that the buyer was entitled to specific performance of the land sale contract.

The Appeal

On appeal, two broad submissions were advanced by the seller. First, it was submitted that the trial judge erred in preferring the evidence of the buyer to

that of the conveyancing clerk in relation to the crucial conversation. Secondly, it was submitted that, in any event, any such agreement by the conveyancing clerk was not within her apparent authority and could not bind the seller to the extension sought by the buyer. It is this second submission that will be of some interest to those who undertake conveyancing on a regular basis.

In dealing with the submission, all judges agreed that a distinction must be drawn between a variation of a contract and a mere extension of the time for settlement. By way of illustration, Williams JA opined:

In my view what occurred in the instant case was not a variation of an essential term of the contract, but rather an extension of time for performance with time remaining of the essence. It is clear from numerous authorities that merely granting an extension of time does not constitute a variation of the contract. (at [3])

Similarly, Philippides J observed:

That the oral extension in the present case operated as a mere extension of time and not as a variation of the contract is supported by a long line of authority including *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41 and *Spencer v Cali* [1986] 2 Qd R 456. (at [56])

Although it is not within the ostensible authority of a solicitor to vary a contract (*Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582, 588), the court observed that an extension of the time for settlement is treated differently. In this regard, existing authority established that it was within the ostensible authority of a solicitor acting for a party in a conveyance to extend the time for settlement of a contract.

Did it make any difference that the extension was granted by the conveyancing clerk rather than a solicitor? On the strength of existing High Court authority, the answer to this question was “no”.

As noted by Keane JA, in *Legione v Hateley* (1983) 152 CLR 406 four of the members of the High Court affirmed that the granting of an extension by way of a temporary indulgence was within the apparent authority of a solicitor's clerk as an incident of the performance of a solicitor's role in a conveyancing transaction. In this regard, the role performed by the conveyancing clerk in this case was indistinguishable from the role performed by the secretary/clerk in *Legione v Hateley*.

In relation to conveyancing practice, Keane JA opined:

The passages which I have cited from the judgments in *Legione v Hateley* show that the engagement of a solicitor by a client to complete a conveyancing transaction involves a holding out of the solicitor as authorised to grant an indulgence by way of an extension of time for completion where that does not involve an actual variation of the terms of the contract. On the authority of *Legione v Hateley*, the granting of a mere extension of time must be treated as one of "the usual aspects of conveyancing practice". (at [50])

Comment

This is yet another decision that highlights the traps inherent in routine conveyancing transactions and, in particular, the imprudence of granting any extensions without first taking express instructions from the client.

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